IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC., *Plaintiff*, v. U.S. DEPARTMENT OF LABOR, et al. *Defendants*.	Case No. 1:19-cv-3574 (APM)

BRIEF OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, LOUISIANA, MISSOURI, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF ORACLE AMERICA, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI* STATES[1]

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 298 (C. Rossiter ed. 2003) (J. Madison). The Founders rejected the brutal efficiency of tyrannical government in favor of the freedom and due process afforded by vertical and horizontal separation of powers. Within this system of carefully divided government, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") is an aberration, exercising unbridled lawmaking and judicial power alongside its proper executive role.

The States of Texas, Alabama, Arkansas, Georgia, Louisiana, Missouri, and West Virginia believe that OFCCP can advance the goals of addressing discrimination and ensuring equal employment opportunity without exercising powers not granted by the Constitution. Indeed, the *Amici* States regularly enforce non-discrimination provisions in their own government contracts without resorting to inquisitorial regimes invested with near absolute power to legislate, adjudicate, and execute judgment. OFCCP's actions, however, have eliminated a crucial check against overzealous and unconstrained enforcement of federal law. By establishing and implementing an elaborate adjudicatory regime without a proper grant of congressional authority, OFCCP has run afoul of the constitutional principle of separation of powers expressed in the non-delegation doctrine. That doctrine prevents

[1] *Amici* are states and file this brief under LCvR 7(o)(1).

an executive agency from creating for itself the power to both write and enforce national policy, as OFCCP has done. *Amici* States therefore urge the Court to declare unlawful OFCCP's enforcement regime for adjudicating discrimination claims against government contractors.

ARGUMENT

I. The non-delegation doctrine is rooted in the principle of separation of powers.

The "fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Put differently, Congress may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825). The doctrine is moored in the Constitution, which vests "[a]ll legislative Powers" in Congress, U.S. Const. art I § 1, and finds its roots "in the principle of the separation of powers that underlie our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *see also* Douglas Ginsburg and Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251, 272 (2010) (observing that the nondelegation doctrine has been "recognized as a foundational principle of the separation of powers"); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 263 (2005) (concluding that while the non-delegation doctrine is not "expressly stated in the Constitution," it is "a better inference from the overall structure of the Constitution" than any contrary principle).

The Framers designed the Constitution in direct response to the abuses of power observed in Europe and antiquity. They believed liberty cannot survive a system of government where the only check on an officer's power was that officer's own conscience or sense of restraint. Accordingly, they designed a republic where the national government possessed only enumerated powers, and the States retained all other powers. U.S. Const. amend. X. To ensure proper restraints on this division of power, they "sought to divide the delegated powers of the new federal government" so that "each Branch of government would confine itself to its assigned responsibility." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

The Framers assigned the role of lawmaking to Congress. They were not unduly sanguine about that role, however, believing that "an 'excess of lawmaking' was, in their words, one of 'the diseases to which our governments are most liable.'" *Gundy v. United States*, 139 S.Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (quoting The Federalist No. 62, at 376). The Framers therefore "went to great lengths to make lawmaking difficult" by imposing a bicameral requirement as well as presentment. *Id*. (observing that "any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto"); *see also* Ginsburg and Menashi, *supra*, at 272 (noting that "the point of the nondelegation doctrine was to keep the locus of lawmaking power in the Congress, where the requirements of bicameralism and presentment assure a connection to the public will").

"The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). "Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). When these checkpoints are bypassed, the Constitution's protections are dismantled. *See id*. Thus, legislative delegation to an executive agency does not even provide a "fig leaf of constitutional justification." *Id*.

"[I]f Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals," then none of these subordinate safeguards would have any effect. *Gundy*, 139 S.Ct. at 2133 (Gorsuch, J., dissenting). Congress would have the ability to sidestep any structural resistance to federal power. The states, meanwhile, would be deprived of vital avenues by which to defend their rights and prerogatives. The result would be the worst of two worlds, where the federal government lacks any restraint on its willingness to claim power, and where the fusion of legislative and executive authority ensures that the power the federal government wields is broadly subject to abuse.

II. Failure to abide by the non-delegation doctrine enables abusive regulatory regimes.

The non-delegation doctrine prevents federal agencies wielding adjudicatory power from adopting abusive practices. Administrative adjudication, even when authorized by Congress, strains the limits of separation of powers. *See* Judge James L. Dennis, *Judicial Power and the Administrative State*, 62 La. L. Rev. 59, 59 (2001).

It creates an alternative pathway for the resolution of disputes, recasting executive agencies as quasi-judicial bodies. The coalescence of judicial and executive authority presents unique dangers to individual liberty. *See* Todd David Peterson, *Procedural Checks: How the Constitution (and Congress) Control the Power of the Three Branches,* 13 Duke J. Const. L. & Pub. Pol'y 209, 227-28 (2017). According to Montesquieu, the fusion of executive and judicial authority removes the primary check against overzealous and unjust enforcement. "Were it joined," Montesquieu argued, "the judge might behave with violence and oppression" and turn otherwise neutral rules into vehicles of harassment. Montesquieu, The Spirit of the Laws 152 (Thomas Nugent trans. 1899).

The danger is heightened in federal adjudicatory regimes embedded in administrative agencies, which lack many of the procedural safeguards available in Article III courts.[2] Administrative agencies must conform to the requirements of due process when conducting proceedings. *See Sw. Airlines Co. v. Transp. Sec. Admin.*, 554 F.3d 1065, 1074 (D.C. Cir. 2009) (stating that adjudicative decisions "belonged to the class of cases for which due process is typically, and almost exclusively, applicable."). However, procedural due process in an administrative setting "does not always require all of the protections afforded a party in a judicial trial." *Beverly*

[2] *See McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery; further, courts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings."); *see also Kirwa v. U.S. Dep't of Def.,* 285 F. Supp. 3d 257, 274 (D.D.C. 2018) ("Defendants are correct that agency rules of broad applicability normally do not implicate the same due-process concerns typical of agency adjudications involving individual rights.").

Enterprises, Inc. v. Herman, 130 F. Supp. 2d 1, 18 (D.D.C. 2000). Instead, agencies adjust the requirements according to "time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (instructing courts to analyze the governmental and private interests affected when determining the constitutional sufficiency of administrative procedures). As a result, agencies have wide discretion when structuring the procedures that govern regulatory enforcement.

In the absence of these constitutional protections, participants drawn into administrative proceedings depend upon Congress to prescribe clear-cut rules and standards that agencies must follow. Congress may not grant administrative agencies carte blanche authority to conduct investigations or otherwise enforce federal laws. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (stating that "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires"). Rather, Congress must articulate intelligible standards that cabin agency discretion. The extent of these boundaries will depend on the public and private interests at play, but typically include identification of the offense and remedies available as well as state the conditions for initiating and maintaining an investigation. In addition, Congress will often provide for the possibility of judicial review; state whether there is a necessity for an in-person hearing; and stipulate both the burdens of proof and the prescriptive period in which the complaint must be filed and the investigation completed.

If Congress were permitted to delegate these responsibilities wholesale, then the primary check against overzealous and unjust administrative enforcement would evaporate. Federal agencies would be emboldened to set their own limits, subject only to a highly deferential mode of judicial review. *See Level the Playing Field v. FEC*, 381 F. Supp. 3d 78, 88 (D.D.C. 2019). Absent meaningful restraints, the "germ of corruption and degeneracy" identified by the Framers would push agencies towards proscribing more conduct, initiating more proceedings, and exerting irresistible pressure on subjects of investigations to achieve their preferred outcome. Thomas Jefferson, Notes on the State of Virginia 274 (Merrill D. Peterson ed., 1984). The government will defend these changes as being necessary to the common good and efficient, as the District of Columbia argued here. *See* Amicus Curiae Br. of the District of Columbia at 6 (ECF No. 15). But the cost of that efficiency will be the liberty and security of the American people.

III. OFCCP presides over an enforcement regime that violates separation of powers and the non-delegation doctrine, specifically.

For an agency to "exercise [] quasi-legislative authority," its actions "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The adjudicatory enforcement regime implemented by OFCCP has neither. Congress never authorized OFCCP to reach beyond its limited contract compliance role and to create a comprehensive administrative scheme for adjudicating claims of systemic discrimination by government contractors. Moreover, regardless of whether such authorization could be divined in statutory text, Congress failed to provide an

intelligible principle that would guide and limit OFCCP's discretion when prosecuting discrimination claims and extracting back pay awards properly belonging to private employees. This has led to a compliance apparatus that lacks necessary safeguards and that is prone to abuse.

A. Congress did not authorize OFCCP's enforcement regime.

No congressional statute authorizes DOL to adjudicate claims of alleged workplace discrimination. The closest Congress has come is the Federal Property and Administrative Services Act of 1949 ("Procurement Act"). However, even there, the text of Procurement Act bears no discernible relationship to the enforcement apparatus implemented by OFCCP.

Congress enacted the Procurement Act to promote economy and efficiency in government contracting. In doing so, it granted the President discretion to "prescribe policies and directives that the President considers necessary to carry out" the Act's goals. 40 U.S.C. § 121(a). Courts have interpreted these provisions as reaching beyond "the immediate quality and price of goods and services purchased." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996); *see also UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 367 (D.C. Cir. 2003). Accordingly, these courts have upheld measures based on "secondary policy views," such as a government contractor's employment practices. *Reich*, 74 F.3d at 1337.

But while the Procurement Act may authorize the executive to insert equal opportunity clauses into government contracts, it provides no foundation for the creation of an expansive enforcement apparatus to investigate, prosecute, adjudicate, and remediate claims of discrimination properly belonging to private employees.

When Congress intends for an agency to establish an adjudicatory regime, it states so plainly. *See*, *e.g.*, Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 657–61 (1970). Congress does not issue blank checks. It instead defines and limits the scope of the agency's power in considerable detail "set[ing] forth with precision the agency procedures to be followed and the remedies available." *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 574 (1989). The Procurement Act contains none of these features.

The Procurement Act provides a remarkably threadbare basis for OFCCP's regime when compared to actual grants of adjudicatory authority found in other statutes. In OSHA, for example, Congress provided for a robust system of administrative adjudication, 29 U.S.C. §§ 657–61, which expressly delineated the agency's investigative capabilities, *see* 29 U.S.C. § 657, and authority to hold hearings, *see id.* § 659(c). Congress listed the exact penalties DOL could impose for violations of the chapter. *See id.* § 666. It also expressly afforded private parties the right to judicial review. *See id.* § 660. Similarly, the Federal Railroad Safety Act ("FRSA") granted DOL adjudicatory power, but it required that an employee file a complaint before the agency could initiate proceedings. 49 U.S.C. § 20109 (1970). In addition, the statute established a 180-day statute of limitations. *Id*. It provided employers with affirmative defenses, and it required that DOL meet specific burdens of proof before issuing an order. *Id*. §§ 20109, 42121. Moreover, if an employer failed to comply with DOL's findings, the statute requires DOL to file a civil action in district court to secure relief. *Id*. at § 20109.

Comparable safeguards can be found in civil rights legislation. *See*, *e.g.*, Title IX, 20 U.S.C. §§ 1681–1688 (1972); Title VI, 42 U.S.C. §§ 2000d–2000d-7. Title VI, for instance, places "elaborate restrictions on agency enforcement." *Alexander v. Sandoval,* 532 U.S. 275, 290 (2001). The agency can take no action unless it first advises the appropriate person of his alleged failure to comply; nor may it act until it has determined that compliance cannot be secured by voluntary means. 42 U.S.C. §§ 2000d-1. Congress specified that any termination of funds will be limited to the "particular program . . . in which noncompliance has been so found." *Id.* Congress also ensured the agency's proceedings would be subject to interbranch scrutiny. *See id.* (only permitting termination of funding 30 days after the head of the agency files a report with the appropriate House and Senate committees); 2000d-2 (expressly affording judicial review of the agency's actions).

The Procurement Act, conversely, does not even mention the requirement that government contractors maintain fair and non-discriminatory employment practices, much less lay out the procedures by which OFCCP should ensure compliance. It offers a single sentence that merely gives the President some flexibility in drafting federal contracts. This complete absence of statutory authorization and guidance supports only one conclusion: Congress never intended the Procurement Act to sanction OFCCP's wholesale adjudication of employment discrimination claims. If it had, the language would have been far more explicit. Because OFCCP has no authority except that which is "conferred upon it by Congress," its failure to identify a legislative source of authority for its adjudicatory regime renders that regime unlawful and

invalid.[3] *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (describing federal agencies as "creature[s] of statute").

B. Congress provided no intelligible principle to guide OFCCP's decision making.

Although Congress may procure assistance from its coordinate branches of government, it cannot forsake its constitutional duties by delegating to another branch unguided and unchecked discretion. *See Loving*, 517 U.S. at 758. Any delegation must contain "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). To provide that intelligible principle, Congress must, at the very least, make clear "to the delegee 'the general policy' [it] must pursue and the 'boundaries of [the delegee's] authority." *Gundy*, 139 S.Ct. at 2129 (Gorsuch, J., dissenting) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

The Procurement Act provides no discernible, much less intelligible, principle to guide OFCCP's foray into policing allegations of systemic discrimination. Again, the Act merely gives the President some discretion when drafting federal contracts. 40 U.S.C. § 121(a). Its only instruction is that any directives issued pursuant to the provision be "necessary" to effectuate an "economical and efficient system" for "procuring and supplying property and nonpersonal services." *Id.* §§ 101,121(a). If this text delegates to DOL authority to prosecute and adjudicate claims of workplace

[3] *Amici* offer this assertion on the assumption that the Court will reach the case's merits. *Amici* take no position with respect to Defendant's argument that the claims raised in Oracle's brief are non-justiciable.

discrimination and award back pay to aggrieved employees, that delegation is absolute and wholly unbounded. It would commit entirely to the agency every conceivable policy decision: the decision on whether an adjudicatory regime should be formed; the characteristics and procedures the regime should adopt; and the rules and regulations the regime should enforce.

This is not a situation where Congress made the relevant policy decisions and simply left to another branch the responsibility "to fill up the details." *Wayman*, 23 U.S. at 43. Nor is it a situation where Congress prescribed a rule and then made the application of that rule turn on executive factfinding. *See Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting) (identifying reliance on executive factfinding as among the limited types of lawful delegation by Congress); s*ee also*, *e.g.*, *United States v. Warden*, 291 F.3d 363, 366 (5th Cir. 2002) (permitting interbranch delegation where executive officers apply a rule after engaging in factfinding). Instead, Congress took no part in crafting the shape or intensity of the agency's enforcement policy. OFCCP claims absolute discretion in this area.

Thus, the most that can be said is that Congress acquiesced to OFCCP's lawmaking when it neglected to pass countervailing legislation. *See* Mot. for Summ. J. at 34 (ECF No. 23). As Justice Kennedy noted, however, "abdication" is not recognized as part of the constitutional design. *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). The Constitution requires that Congress enact legislation *before* OFCCP exercise any quasi-legislative powers. The Constitution further requires that Congress state with specificity an intelligible

principle and that it do so via the procedures stipulated in Article I, section 7. At no point does the Constitution permit Congress to delegate its legislative powers via silence and without limitation.

The District of Columbia, along with its fellow *Amici* states, ask the Court to ignore these constitutional shortcomings. The reason given is that OFCCP is supposedly "efficient" at detecting and deterring workplace discrimination. *Amici* agree that stopping discrimination is an important and worthy end. *Amici* in fact have enacted multiple laws, which prohibit discriminatory practices by employers. *See*, *e.g.*, Tex. Labor Code Chs. 21 & 451. Where *Amici* disagree is with the District of Columbia's assertion that laudable ends can excuse a federal agency from complying with the Constitution. *See Chadha*, 462 U.S. at 944 ("the fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution").

The Constitution was ratified not in spite of its inefficiencies but, in part, because of them. *See Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (observing that "separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power"). The Framers recognized that the separation of powers would inhibit the creation of good, even noble, laws. They nevertheless divided power among and within the branches, denying any one entity the ability to act alone. The Framers made this decision because the absence of checks and balances inevitably leads to the exercise of arbitrary power, which can cause as a severe of an injustice as the one the District of

Columbia seeks to prevent. The failure of federal agencies to comply with the separation of powers can have very real consequences for Americans. It leads to abusive and coercive practices—something from which OFCCP has not been immune.

C. OFCCP has abused the vast authority it has unlawfully claimed for itself.

Since the OFCCP operates its anti-discrimination enforcement regime in excess of its statutory authority, the OFCCP has been able to determine the rules and then serve as prosecutor, judge, jury, and executioner. This nearly limitless power has allowed the agency to engage, at times, in abusive practices. *See* U.S. Chamber of Commerce, Office of Federal Contract Compliance Programs: Right Mission, Wrong Tactics – Recommendations for Reform 2 (Fall 2017). For example, the OFCCP regularly brings enforcement actions solely on the basis of contractor-provided data. Left unchecked, the agency can pursue a disparate impact action against a contractor without disclosing the statistical modeling used to evaluate the data or without pursuing corroborated testimony from alleged victims. *Id.* at 19. In the absence of institutional safeguards, regulators have reportedly been so bold as to tell contractors, "we can ask for anything we want" and that "the judge works for us." *Id.* at 3.

To make matters worse, contractors have little recourse to combat an OFCCP investigation. Enforcement actions are brought before the agency Administrative Law Judge and recommendations can be appealed to the Administrative Review Board. 41 C.F.R. §§ 60-30.14, 60-30.28. It is only after enduring this extensive process that a contractor can seek independent review from an Article III court. Few

contractors are willing to engage in the adjudication process long enough to reach an Article III court because OFCCP can institute a debarment remedy against a contractor without a final judgment. *See* U.S. Chamber of Commerce, Recommendations for Reform, at 19. Additionally, OFCCP has taken the position that there is no statute of limitations to prevent them from initiating an enforcement proceeding. *See* 41 C.F.R. § 60.1-26(b)(1); *OFCCP v. Am. Airlines*, 94-OFC-9, Decision and Remand Order, 1996 WL 33170032, at *11 (Dep't of Labor Apr. 26, 1996). Therefore, the constant threat of debarment and the ability for the OFCCP to pursue claims in perpetuity is often too great, and contractors settle cases even if the claims of wrongdoing are minuscule at best. *See* U.S. Chamber of Commerce, Recommendations for Reform, at 19-20. If left unchecked these broad sweeping enforcement actions are likely to remain a permanent fixture of the OFCCP to the detriment of those drawn into its regulatory labyrinth.

IV. States successfully police unlawful discrimination by government contractors without resorting to constitutionally suspect enforcement regimes.

The District of Columbia contends that paring back OFCCP's enforcement regime to match its statutory authorization would gut the nation's capability to fight workplace discrimination. *See* Amicus Curiae Br. of the District of Columbia at 20–25 (ECF No. 15). This is categorically incorrect. Throughout the United States, state legislatures have enacted multiple regimes to enforce equal opportunity through government contracting while ensuring that contractors receive due process throughout. These regimes impose high standards for the nation's employers to meet.

More significantly, they implement the same objectives as OFCCP's enforcement apparatus but without the corresponding intrusions on liberty or the Constitution

Texas, for example, has assumed a legal obligation to employ Historically Underutilized Businesses ("HUB") when procuring goods and services. Tex. Gov't Code § 2161. As a consequence, each state agency, including the state's universities, make "a good faith effort" to secure a minimum percentage of contracts with HUBs. Tex. Admin. Code § 20.284. To aid in these efforts, each state agency prepares a written strategic plan. Tex. Gov't Code § 2161.123. This plan outlines the specific affirmative steps the agency will take to encourage economically disadvantaged persons[4] to participate in government contracting. *Id.* § 2161.123(b). If an agency fails in its obligation, the State Auditor's Office will notify the Legislative Budget Board, who will then take remedial action. *See* Legislative Budget Board Recommendations, Senate Version, Eighty-Sixth Legislature 906–07 (2019). The State Auditor's Office conducts these audits once every biennium. *Id.*

In addition, Texas expects state vendors to comply with state and federal anti-discrimination laws. Accordingly, state agencies insert an equal opportunity clause in each procurement contract, which conditions the receipt of state funds on the vendor maintaining non-discriminatory business practices.[5] Unlike OFCCP, Texas does not need a complicated adjudicatory regime to enforce its policy. If the state

[4] The Texas Government Code defines "economically disadvantaged person" as a person who: (A) is economically disadvantaged because of the person's identification as a member of a certain group; and (B) has suffered the effects of discriminatory practices or other similar insidious circumstances over which the person has no control. Tex. Gov't Code § 2161.001(3).

[5] Texas does not utilize a uniform equal opportunity clause across state agencies and contracts. Thus, while the substance of the clause remains the same, the exact language inserted into the contract varies agency to agency.

suspects that a vendor engaged in discrimination, it will approach the vendor to furnish an explanation.[6] If the vendor fails to comply, or if the evidence shows that a violation occurred, Texas will treat the violation as a breach of contract and pursue all remedies allowed by the agreement. This includes filing a claim in state court. The Texas Comptroller also has the option to bar the vendor from participating in state contracts for a period of five years. Tex. Gov't Code § 2155.077.

There are proven ways to combat discrimination by government contractors that do not entail sacrificing the basic principles that underlay a free society. Despite the suggestions to the contrary, Americans will remain protected from discrimination if OFCCP was confined to the mandate Congress assigned to it.

CONCLUSION

For the foregoing reasons, *Amici* States urge the Court to declare unlawful OFCCP's enforcement regime for adjudicating discrimination claims against government contractors.

[6] Many state contracts require the vendor to furnish information about the vendor's hiring and promotion policy, among other business practices, upon request. *See*, *e.g.*, Texas Department of Information Resources, Equal Opportunity Clause.

Date: May 1, 2020

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

PATRICK K. SWEETEN
Associate Deputy for Special Litigation

/s/ Lanora C. Pettit
LANORA C. PETTIT
Assistant Solicitor General

KATHLEEN T. HUNKER
Special Counsel

ROBERT CALLAN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
lanora.pettit@oag.texas.gov
kathleen.hunker@oag.texas.gov
robert.callan@oag.texas.gov

COUNSEL FOR *AMICI* STATES

ADDITIONAL COUNSEL

Counsel for Amici *States*

STEVE MARSHALL
Attorney General
State of Alabama

JEFFREY MARTIN LANDRY
Attorney General
State of Louisiana

LESLIE RUTLEDGE
Attorney General
State of Arkansas

ERIC SCHMITT
Attorney General
State of Missouri

CHRISTOPHER M. CARR
Attorney General
State of Georgia

PATRICK MORRISEY
Attorney General
State of West Virginia

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 1, 2020, and that all counsel of record were served by CM/ECF.

/s/ Lanora C. Pettit
LANORA C. PETTIT